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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

13 In re:

14 Peter M. Bucklin,

15 Debtor.

Chapter 11

No.: 10-64467-fra11

**INTERVEST MORTGAGE  
INVESTMENT COMPANY'S  
OPPOSITION TO DEBTOR'S MOTION  
FOR INTERIM USE OF CASH  
COLLATERAL**

**DATE: AUGUST 9, 2010**

**TIME: 2 PM.**

**PLACE: COURTROOM 6**

**HONORABLE FRANK R. ALLEY**

21  
22 Intervest Mortgage Investment Company ("Intervest"), a secured creditor of the  
23 debtor as it relates to the real property commonly referred to as the Los Banos Center,  
24 objects to the Debtor's Motion for Interim Use of Cash Collateral as follows:  
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**I.****INTRODUCTION**

The Debtor's Motion for Preliminary Use of Cash Collateral should be denied for the following reasons:

a. The debtor does not provide adequate protection to Intervest for the debtor's use of Intervest's cash collateral;

b. The proposed budget lacks detail and provides for payment of expenses not necessary for the maintenance of Intervest's collateral, including but not limited to, exorbitant set-asides for professional fees and costs that are not necessary and reasonable; and

c. The bankruptcy estate owns a 27.5% beneficial interest in the Los Banos Center. The remaining tenants in common ("co-owners") are not in bankruptcy and Intervest has the right to continue to collect 72.5% of the rents notwithstanding the Debtor's bankruptcy filing.

**II.****STATEMENT OF FACTS**

On October 15, 2008, Intervest made an \$8,725,000 construction loan to Peter M. Bucklin and Joan B. Bucklin as trustees to the Peter M. and Joan B. Bucklin Revocable Trust, Robert V. Rowland, and Christopher M. Bucklin, as tenants in common. The loan was secured by a first deed of trust against parcel number 431-141-019, commonly referred to as the Los Banos Center in Los Banos, California. The deed of trust contains an absolute assignment of rents clause and security agreement covering personal property. The Debtor concedes that Intervest's deed of trust is properly perfected as the first lien against the real property and is perfected in the rents and the other personal property. Title to the Los Banos Center is held as tenants in common. The debtor's revocable trust owns 55% of which the debtor's beneficial interest represents 27.5%. The debtor's spouse owns the other 27.5%,

1 Robert Rowland owns 35% and the debtor's son, Christopher Bucklin has a 10% interest in  
2 the Los Banos Center.

3 The purpose of the loan was to construct a retail shopping center known as the Los  
4 Banos Plaza. The project originally included the construction of three buildings. One of the  
5 buildings has been completed and occupied, one building has been constructed as a shell, and  
6 one building has not been constructed. The project has encountered difficulties in leasing  
7 and currently Tractor Supply Company is the only occupant of the Los Banos Center. The  
8 rent from the tenant is insufficient to pay the expenses of the property and the debt service on  
9 the loan.

10 Prior to the debtor's filing, the co-owners collected rents in excess of \$225,000 in  
11 lease payments from the sole tenant, Tractor Supply Company, without making any  
12 payments to Intervest and without paying the real property taxes due the county. As a result  
13 of the multiple defaults, in March 2010, Intervest elected to initiate a non-judicial foreclosure  
14 and election to sell under the deed of trust. The trustee's sale was set for August 5, 2010.  
15 While the foreclosure was pending, Intervest exercised its rights under the deed of trust to  
16 collect the rents from Tractor Supply Company. The first rent payment was paid to Intervest  
17 on May 20, 2010 for the May rental payment, in the amount of \$38,833.

18 On July 26, 2010, Peter M. Bucklin, individually, filed a Chapter 11 Bankruptcy  
19 Proceeding. The co-owners of the real property, the Peter M. and Joan B. Bucklin Revocable  
20 Trust, Joan B. Bucklin, Robert Rowland, and Chris Bucklin, have not filed voluntary  
21 petitions under the Bankruptcy Code. The debtor's filing only brings his property into the  
22 estate, which results in a maximum tenant in common interest of 27.5% becoming property  
23 of the estate.<sup>1</sup>

24 \_\_\_\_\_  
25 <sup>1</sup> This assumes that under California law, the terms of this particular trust would result in  
26 property being included in the bankruptcy estate. *See e.g. Zanelli v. McGrath*, 166  
Cal.App.4th 615, 82 Cal.Rptr.3d 835 (Cal.App. 1 Dist., 2008)(property in revocable trust  
deemed to be property of trust settlor and subject to creditor's claims).

1 **III.**

2 **THE CASH COLLATERAL MOTION MUST BE DENIED**  
 3 **BECAUSE INTERVEST IS NOT ADEQUATELY**  
 4 **PROTECTED**

5 The debtor is not entitled to use Intervest's cash collateral because he cannot establish  
 6 that Intervest is adequately protected nor can the debtor provide adequate protection for the  
 7 use of Intervest's cash collateral. *11 USC §363(e)*. Where the debtor intends to use cash  
 8 collateral, the creditor is entitled to adequate protection of its interest. *In re Center*  
 9 *Wholesale, Inc.*, 788 F2d 541, 544 (9<sup>th</sup> Cir 1986). The debtor bears the burden of proof on  
 10 the issue of adequate protection. *11 USC§363(p)(1)*.

11 The debtor's submissions in support of the Motion for Interim Use of Cash Collateral  
 12 do not establish that Intervest is adequately protected. The debtor concedes that there is no  
 13 equity in the Los Banos property. The debtor states Intervest is owed approximately 8.3  
 14 million dollars with the market value of the Los Banos Center at 5.5 million dollars. The  
 15 debtor proposes to offer an additional lien on other non-exempt property, without identifying  
 16 what property that might be, its value, or its liquidity. Intervest cannot comment on the  
 17 adequacy of the additional collateral because the debtor has not filed his schedules at the  
 18 time of this response. Clearly, the debtor has not met his burden of providing adequate  
 19 protection with respect to either the value of the Los Banos property or the value of the  
 20 additional proposed collateral.

21 The debtor's remaining proposal for adequate protection is to offer a replacement lien  
 22 in rents. The replacement lien in future rents, however, is an interest that Intervest already  
 23 has under the applicable provisions of the Bankruptcy Code and its existing security  
 24 documents. Intervest's Deed of Trust includes an absolute assignment of rents provision.  
 25 Prior to the filing of the bankruptcy, as a result of the borrowers' defaults, Intervest exercised  
 26 its rights and actually began collecting the rents. There is no question, therefore, that its  
 interest was perfected and enforceable against the Debtor under 11 U.S.C. §§ 363(a) &

1 552(b). Section 363(a) expressly provides that post-petition rents are cash collateral.  
 2 Section 552(b)(2) expressly states that the post-petition rents are part of Intervest's collateral  
 3 notwithstanding the fact that they are for post-petition occupancy. Thus, the Debtor's  
 4 proposal is nothing more than acknowledging the interest that Intervest already has and each  
 5 and every dollar that is collected post-petition and used during the pendency of the case must  
 6 be adequately protected.<sup>2</sup>

7 In addition to the obvious fallacy of providing adequate protection through granting a  
 8 "replacement lien" in something that Intervest already has a lien on, the debtor's argument  
 9 also suffers from other significant problems. First, even if the "replacement lien" was  
 10 something of value, the only interest the debtor could possibly have is not on the full amount  
 11 of the rents collected, but only approximately 25%, of the rents the estate owns as a tenant in  
 12 common.<sup>3</sup> Yet, the debtor proposes to collect and use not only the estate's interest in the  
 13 rents, but also the other non-debtors' interests in the rents, rents that are subject to Intervest's  
 14 lien rights under California law. Second, given the obvious lack of equity and the Debtor's  
 15 limited interest in the property, the Court should consider whether there is any reasonable  
 16 chance of reorganization, for if there be none, there is no point in allowing the debtor to use  
 17 Intervest's cash collateral. *In re C.F.Simoni's Son's Inc.*, 28 BR 707, 711(E.D.N.C. 1983).  
 18 While almost all chapter 11 cases involve an element of risk, high degree of uncertainty is a  
 19 factor to be considered in evaluating the secured creditor's adequate protection. The debtor  
 20 is underwater in all of the real properties, including the Los Banos Center. Presumably, the  
 21 debtor's intended plan of reorganization is to restructure the lenders' obligations to the  
 22 current market value of the properties. Assuming the debtor could even get the votes to

23 \_\_\_\_\_  
 24 <sup>2</sup> See generally, *In re County of Orange*, 191 B.R. 1005 (Bkrcty.C.D.Cal.,1996)(discussing  
 25 amendments to Bankruptcy Code related to rents and noting that § 552(b)(2) was intended to  
 insure that creditors with prepetition interests in rents would be deemed automatically  
 perfected in post-petition rents).

26 <sup>3</sup> This issue is discussed in more detail below.

1 confirm such a plan, the rental income for the Los Banos Center is not adequate to service  
 2 the debt even at the debtor's proposed value of \$5.5 million. There does not appear to be a  
 3 reasonable chance of reorganization and allowing the use of Intervest's cash collateral under  
 4 the circumstances would be improper.

#### 5 IV.

#### 6 **SINCE INTERVEST IS NOT ADEQUATELY** 7 **PROTECTED BY A REPLACEMENT LIEN, IT IS** 8 **IMPROPER TO ALLOW USE OF INTERVEST'S** 9 **COLLATERAL**

10 The Debtor cites *In Re ProAlert, LLC.*, 314 BR 436 (9<sup>th</sup> Cir BAP 2004), in support of  
 11 its position that the court may allow payment of professional fees and expenses out of  
 12 Intervest's cash collateral. However, this is the situation only when the creditor is adequately  
 13 protected. If the creditor's interest is not adequately protected, then the debtor is, in essence,  
 14 requesting a surcharge of the creditor's collateral under §506(c). The debtor fails to meet his  
 15 burden to establish that the segregation of Intervest's cash collateral for use of professional  
 16 fees and expenses is necessary and reasonable. Courts limit the use of cash collateral to pay  
 17 professional fees and expenses without the debtor showing that the proposed fees are  
 18 necessary and reasonable and that the proposed use of the funds benefits the secured creditor.  
 19 *In re Cascade Hydraulics and Utilities Service Inc.* 815 Fed 2<sup>nd</sup> 546,548 (9<sup>th</sup> Circuit 1987).  
 20 The debtor has the burden and it is implausible that monthly professional fees and salaries in  
 21 the approximate amount of \$39,000 is reasonable and necessary and benefits Intervest's  
 22 collateral.

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## V.

**THE DEBTOR'S PROPOSED BUDGET IS EXORBITANT  
AND SHOULD BE LIMITED TO THE EXPENSES TO  
PREVENT IRREPARABLE HARM UNTIL FINAL  
HEARING ON THIS MATTER**

The monthly gross rent from the Los Banos Center is \$39,488. From the rent, the debtor proposes to pay expenses for property taxes, insurance, landscaping, parking, lights, fire alarms, water and sewer, in the monthly amount of \$7,140. Although these expenses may be appropriate, Intervest has no idea as to whether these are the actual necessary expenses to preserve its interest in the collateral.

More problematic is the administrative expenses that the debtor proposes to pay from Intervest's cash collateral. Exhibit A, page 1 provides for an additional carve-out of \$39,000 from the rents to cover the debtor's salary and benefits, office expenses, attorney and accountant fees. There is no allocation of those fees and expenses between the various properties and presumably, 100% of Intervest's remaining collateral (\$39,488-\$7,140) will be used to fund the overhead and fees. There is no representation or statement in the motion or the budget breaking down what services need to be rendered on a monthly basis that would necessitate incurring professional fees and salaries in the amount of \$39,000 per month. The motion and the budget are wholly deficient in this regard. The debtor did file a statement of income asserting wages of \$11,700. Intervest can only assume that the salary in the proposed budget is for the debtor. It is unreasonable to allow the debtor to receive a salary of \$11,700 per month from Intervest's collateral for collecting rent from one tenant.

## VI.

**THE BANKRUPTCY ESTATE CONSISTS OF A 27.5%  
BENEFICIAL INTEREST IN THE LOS BANOS CENTER**

Title to the Los Banos Center is held as tenants in common between the debtor (27.5% interest), his non-debtor spouse, Joan B. Bucklin (27.5% interest), Robert Rowland

(35% interest), and Chris Bucklin (10%). It is questionable whether the filing of the debtor's bankruptcy as an individual, allows the debtor to even collect the rents from property partially owned by a Revocable Living Trust and other co-owners. Assuming that the debtor does have such rights, under California law, the debtor's interest as a tenant in common with the co-owners, represents no more than a 27.5% interest in the rents. *See generally Heber v. Yaeger*, 251 Cal.App.2d 258, 265, 59 Cal.Rptr. 353, 357 (1967)(tenants in common own rents collected from third party tenants in proportion to interest in property); *Dabney-Johnston Oil Corp. v. Walden*, 4 C2d 637, 52 P2d 237 (1935)(same). The remaining rents do not constitute property of the bankruptcy estate. *See In re Fazzio*, 180 BR 263, 269 (Bankr. ED Ca 1995)(discussing California tenant in common law)

Prior to the filing, Intervest was collecting the rents from the sole tenant, as allowed by California Civil Code §2938. At a minimum, Intervest has the right to continue to collect 72.5% of the rents and requests that the court make such a finding that said rents do not constitute estate property.

## VII.

### CONCLUSION

Based upon the foregoing, Intervest requests that the Court deny the debtor's Motion for Use of Cash Collateral and for such other relief as the Court deems proper.

DATED: August 5, 2010

BULLIVANT HOUSER BAILEY PC

By /s/ Stephen P. Arnot

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of August, 2010, I caused to be served the foregoing INTERVEST MORTGAGE INVESTMENT COMPANY'S OPPOSITION TO DEBTOR'S MOTION FOR INTERIM USE OF CASH COLLATERAL on the following parties at the following addresses:

Thomas W. Stilley  
1000 SW Broadway #1400  
Portland, OR 97205  
**Debtor's Attorney**

US Trustee, Eugene  
405 E 8th Ave #1100  
Eugene, OR 97401-2706  
**US Trustee**

by:

<input checked="checked" type="checkbox"/>	U.S. Postal Service, ordinary first class mail
<input type="checkbox"/>	U.S. Postal Service, certified or registered mail,
<input type="checkbox"/>	return receipt requested
<input type="checkbox"/>	hand delivery
<input type="checkbox"/>	other (specify) _____

/s/ Stephen P. Arnot  
Stephen P. Arnot, OSB#070765